United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-6122

75-6122

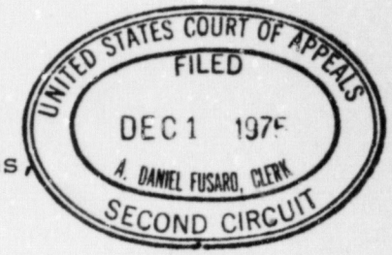
To Be Argued by Aaron Locker

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 75-6122

NATIONAL ORNAMENT & ELECTRIC LIGHT CHRISTMAS ASSOCIATION, INC., et al.,

Appellees,



-against-

CONSUMER PRODUCT SAFETY COMMISSION, et al.,

Appellants.

BP/s

On Appeal From the United States District Court
For the Eastern District of New York

APPELLEES' BRIEF

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TABLE OF AUTHORITIES

Legislative History:

Debate on the Floor of the House, Congressional Record, September 20, 1972

Report of House Commerce Committee, 92nd Congress, Report No. 92-1153, June 20, 1972

Report of Senate Commerce Committee, 92nd Congress, Report No. 92-149, April 13, 1972

Statutes:

Administrative Procedure Act 5 U. S. C. 551, 552, 553, 702, 706.

Consumer Product Safety Act, 15 U. S. C. 2054, 2055, 2056, 2057, 2058.

Federal Rules of Civil Procedure, Rule 52 (a).

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
----------x

NATIONAL ORNAMENT & ELECTRIC LIGHT
CHRISTMAS ASSOCIATION, INC., et al.,

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-against-

Docket No.
75-6122

CONSUMER PRODUCT SAFETY COMMISSION,
et al.,

Appellant
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BRIEF OF APPELLEES

PRELIMINARY STATEMENT

This brief is submitted in opposition to the appeal taken from the order of the U. S. District Court, Eastern District of New York entered on November 12, 1975 (Honorable Jacob Mishler) preliminarily enjoining defendants, their servants, agents and employees from distributing a certain booklet entitled "What Can You Do Now and How Should You Do It?" to the extent that said booklet contained certain language and illustrations which suggested tests to discover defects in Christmas decorative lights.

In all other respects, the motion for a preliminary injunction was denied.

FACTS

On November 10, 1975, plaintiffs instituted an action in the U.S. District Court, Eastern District of New York, seeking declaratory and injunctive relief to enjoin the implementation of an order issued by defendant Consumer Product Safety Commission (hereinafter the "Commission") and the individual defendants, which order was entitled "Consumer Deputy Program - Retail Survey of Christmas Decorative Lights" (Order No. 9010.83) upon the grounds that said order was null and void and unauthorized by law (A.36-53).* On November 10, 1975, plaintiffs moved for a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure to enjoin defendants from enforcing Order No. 9010.83 pending a full trial upon the merits and for a temporary restraining order in this action (A.54-76).

Counsel for defendants were notified on November 7, 1975 that plaintiffs would apply for a temporary restraining order and counsel for both sides appeared before Judge Mishler on November 10, 1975.

On the record, Judge Mishler asked counsel for both sides to recite the facts that were stipulated (A. 96, 97).

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* References are to pages of "Joint Appendix" to be submitted by both parties.

The following facts, among others, were stipulated:

"The Court: That's argument. The facts are that you represent plaintiffs who do $50 million worth of Christmas light business. This is the scene: that if the program is carried out that it will destroy the Christmas business.

"Mr. Locker: That's correct.

"The Court: Very few Christmas lights have been passed by any of these tests, have been found to be defective.

"Mr. Locker: Never applied before. Just thought up for the benefit of this program.

"The Court: How about bare wires, cracked sockets? Does that constitute a very small percentage of Christmas lights sold?

"Mr. Locker: On the basis of the Commission's own injury information, yes.

"The Court: Those are the facts. Do you agree with everything said so far, Mr. Schmeltzer?

"Mr. Schmeltzer: Not entirely. We would like to point out that the consumer deputies are not performing tests. They are showing a mock-up of a set of lights which have exposed hazards and presenting to the retailer a booklet which tells them how to uncover exposed hazards."

(A. 102, 103).

Defendants did not submit opposing affidavits and accordingly, the following facts were never disputed by defendants.

In October of 1975, the Commission issued an order (Order No. 9010.83) which purported to provide guidelines for conducting a Consumer Deputy Program for Christmas decorative lights. The program was designed to utilize consumers and consumer groups to supplement the Commission's inspection efforts. The objective was to survey retail outlets for Christmas decorative lights which may present potential hazards. (A. 11).

The effective date of the program was scheduled to begin November 1, 1975 and end on January 15, 1976 (A. 12). The period from November 1 to December 25 is the prime selling season for Christmas decorative lights and the time of the year when all retail outlets are engaged in the height of holiday sales activity. The plaintiffs involved herein have gross annual sales in excess of $50 million. (A. 58, 62).

The Consumer Deputy Program provides for the training of volunteers (A. 13). Each volunteer will be supplied with a booklet "What Can You Do Now and How Should You Do It"? (A. 26). This booklet outlines the allegedly potential hazards in decorative lights and test procedures therefor. The booklet contains five screening methods to evaluate alleged hazards, such as cracked sockets, loose add-on connectors, exposed bare wires, exposed bulb contact wire and exposed socket contact.

Each deputy is provided with a demonstration set of lights on which certain alleged hazards are visible. (A. 22). After demonstration, the deputy makes a survey of the display of decorative lights and records certain information, including manufacturer's name and address; name of product; style number; catalog number and other factual data. (A. 23). The deputy then asks the retailers if an inspection will be made. The deputy provides a fact sheet which outlines the retailer's duty to monitor the safety of products and report substantial hazards and the criminal and civil sanctions which relate thereto. (A. 64). The deputy then, according to the order, advises the retailer that his report will be filed with the Commission and that "an official follow-up visit may result." (A. 14).

The deputy is provided with a letter of introduction on the stationery of the Commission identifying the deputy as a volunteer participating with the Commission "in a program to make retailers aware of the potential hazards of Christmas decorative lights." The order initially provided that deputies would "suggest" to retailers in the interest of public safety that lights which appear to have hazards be removed from the shelves. (A. 14). That "suggestion", after complaint by plaintiffs' counsel to the 5 members of the Commission was deleted (A. 83). However, its initial inclusion is indicative of the fact that the Program's purpose was not merely information.

No proceeding has ever been commenced by the Commission for the promulgation of a consumer product safety standard relating to Christmas decorative lights under Section 7, 15 U.S.C. 2056. Such a proceeding would require publication in the Federal Register of a notice. Said notice would require the identification of the product and risk involved; state the Commission's determination that a standard is necessary to eliminate or reduce risk of injury; include information with respect to any existing standards and include an invitation to interested parties to develop a standard. Thereafter the Commission would be required under Section 9, 15 U.S.C. 2058, to promulgate the standard pursuant to Section 553 of the Administrative Procedure Act, except that an opportunity would be given for oral presentation of data, views and argument, in addition to written submissions. None of these safeguards have been afforded to plaintiffs herein. (A. 60).

No proceeding has ever been commenced by the Commission to promulgate a rule declaring that Christmas decorative lights are banned hazardous products pursuant to Section 8, 15 U.S.C. 2057. Such a proceeding would be subject to similar safeguards relating to notice and opportunity to be heard as are provided with respect to consumer product safety standards under Section 7. None of these safeguards have been afforded to plaintiffs herein. (A. 60).

Plaintiffs are at the peak of their selling season for the Christmas holiday. They will suffer severe and immediate

financial hardship if the Commission enforces its order. Plaintiffs wll have no opportunity to challenge the findings of unskilled volunteers transmitted to untrained store managers that certain decorative lights present potential hazards. Retailers are likely to return all products which a consumer deputy inspects as potentially hazardous. Since the season is extremely short, plaintiffs will not be able to review the findings which have been made by these volunteers and to correct any erroneous findings which may have been made. Plaintiffs will lose considerable good will and reputation for manufacturing safe products (A. 62).

On November 12, 1975, Judge Mishler entered his order, and defendants served a notice of appeal. No action was taken by the Commission with respect to Christmas decorative lights program until November 19, when an application for a stay of injunction pending appeal was denied by Judge Mishler. According to defendants, the Program was "temporarily suspended" pending appeal. (A. 132). Apparently, the Commission felt that if it could not regulate as it desired, it would not regulate at all.

On November 25, this Court denied defendants' application for a stay of injunction pending appeal and ordered an expedited appeal to be heard on December 2, 1975.

It is plaintiffs' contentions that the Commission has exceeded its statutory authority by the issuance of test

methods for identifying alleged defects in Christmas decorative lights. These test methods are "standards" or "rules" which have a substantial impact upon the entire industry and upon plaintiffs. Accordingly, such standards or rules must be promulgated in accordance with the statutory procedures of the Consumer Product Safety Act (15 U.S.C. 2056, 2058) and the Administrative Procedure Act (5 U.S.C. 533). They must also be published under the Freedom of Information Act (5 U.S.C. 552).

The Commission has determined that certain aspects of Christmas decorative lights present "potential hazards". By training its volunteers to inspect for those potential hazards, the Commission has evaded and circumvented the procedures by which manufacturers are entitled to challenge those findings. Implicit in CPSA are the safeguards which require that findings relating to risks of injury in consumer products be made only by the prescribed statutory procedures which assure manufacturers notice and opportunity to be heard and require specific findings to be made and published by the Commission.

Defendants have taken action which is unauthorized by the provisions of the Consumer Product Safety Act and the Administrative Procedure Act. The moving affidavits on the motion for a preliminary injunction demonstrated that there was a threat of irreparable injury to plaintiffs who are engaged in their peak selling season and faced loss of sales, returns and loss of good will and reputation if defendants continued

to enforce the order. Granting injunctive relief did not inflict injury on the public since there is no evidence of any significant injuries sustained as a result of the alleged hazards.

Defendants seem to be contending that the Commission can issue any information, warnings or tests, in its sole discretion, if it determines that there are potentially defective consumer products on the market. Such a contention, when carried to its logical conclusion, becomes absurd. The Commission, in the guise of disseminating information, could circulate the most stringent technical specifications which have been devised internally by its own staff. Although these technical criteria may lack scientific validity and be completely unreasonable, the regulated industry would have no right to be heard and no recourse.

POINT ONE

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING INJUNCTIVE RELIEF TO PLAINTIFFS

Rule 52 (a) of the Federal Rules of Civil Procedure provides that "findings of fact shall not be set aside unless clearly erroneous." Thus the findings are presumptively correct. The burden is on the appellants to persuade the reviewing court that a finding was clearly erronecus.

As stated in Unicon Management Corp. v. Koppers Company, 366 F2d 199, 203 (2nd Cir. 1966):

> "On the basis of the findings of fact made by the district court, which we must accept unless clearly erroneous, Federal Rules of Civil Procedure, Rule 52 (a), we find that it was not an abuse of discretion to issue a preliminary injunction in this case."

The Court further stated at 366 F2d page 204:

> "We reaffirm our holding in H. E. Fletcher Co. v. Rock of Ages Corp., 362 F2d 13, 17 (2 Cir. 1963) that the party seeking a preliminary injunction has a burden of convincing [the court] with reasonable certainty that it must succeed at final hearing Hall Signal Co. v. General Ry Signal Co. 153 F2d 907, 908 (2 Cir. 1907, where as there, it appears that a 'lack of adequate showing of irreparable damage' also exists. But we do not think that what we said in Fletcher is a departure from the more generally accepted statement of the rule that 'it will ordinarily be enough that plaintiff [defendant here] has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus far more deliberate investigation' where, as here, 'the balance of hardships ' tips decidely toward the party requesting the temporary relief."

In Aunt Mid, Inc. v. Fjell-Oranje Lines, 458 F2d 712, 718 (7th Cir. 1972), the Court stated that in determining whether there was sufficient basis for the court's findings of fact, it must take the view of the evidence and the inferences deducible therefrom which is most favorable to the party prevailing below.

The district court below filed its memorandum of decision and order, in which its findings of fact and conclusions of law appear. The court below noted that the parties stipulated certain facts "with the expectation of avoiding an evidentiary hearing on the motion for a preliminary injunction." (A.4).

The court below found that "the booklet provides the retailer with five sample screening methods of determining defective parts of Christmas lights. Nos. 1 and 4 are visual examinations to discover defects in sockets and exposed bulb contact wires. The other methods combine visual inspections and added suggestions for tests to determine possible concealed defects " (A6). Having so found, the court ruled that to the extent that the booklet "suggests tests to discover defects that are not apparent on visual examination, it exceeds the Commission's statutory authority, since the prescribed procedures for developing and adopting standards are not followed " (A9). Accordingly, the district court ordered defendants to excise certain language and illustrations in tests Nos. 2, 3 and 5.

Specific findings with respect to irreparable injury were not necessary in light of defendants' stipulations of fact upon the record. Moreover, no opposing affidavits were submitted by

defendants challenging plaintiffs' contentions with respect to irreparable injury. Defendants have included in the Joint Appendix the affidavit of defendant Richard Simpson, Chairman of the Commission. Said affidavit was sworn to on November 13, 1975, one day after Judge Mishler entered his order(A.132). This affidavit was submitted in support of an application for a stay of injunction pending appeal in the district court and should not be part of the record on this appeal. The fact sheets which are annexed to the Simpson affidavit (A138, 140, 143) were similarly exhibits on the application for a stay and should not be part of the record on appeal.

Defendants contend that plaintiffs have not adequately demonstrated a threat of irreparable injury since they merely allege that retailers will return inventory rather than test the products and that plaintiffs do not demonstrate that their products will be affected by the test procedures. Even assuming that defendants have not conceded irreparable injury on the record, these contentions are without merit.

Plaintiffs allege that irreparable injury will occur when retailers test their products. Because of time limitations prior to Christmas 1975, plaintiffs will not be able to challenge erroneous and subjective findings that hazards exist because of failure to meet subjective performance standards (A.62). Furthermore,

plaintiffs' reputation as manufacturers of safe products for many years will be placed in jeopardy. See GTE Sylvania, Incorporated v. Consumer Product Safety Commission, Civil Action 75-104 (D. C. Delaware, 1975) 1 CPS Para. 75,090. Plaintiffs further established that the test procedures were so structured that safer light sets with thicker insulation would be more likely to fail test No. 3, the cranking test, (A.29) than less safe sets using thinner less durable wire and insulation (A.76). Any test which results in removal of safer products from the market is clearly unreasonable.

The district court was aware of its burden in granting injunctive relief against the Government where public interest was involved, citing Yakus v. United States, 321, U. S. 414, 440, 64 S. Ct. 660, 675 (A.8). Moreover, the transcript clearly indicates that the Court found no adverse impact on the public. After defendants' counsel cited statistics relating to injury data on decorative lights, the Court stated that the statistics favored plaintiffs and that the Court would have expected much more significant injury data on a nationwide basis considering the "billions of lights around" (A.123,124,125).

Accordingly, the district court's findings that (1) the booklet contained suggested test procedures to determine possible concealed defects; (2) that plaintiffs were threatened with irreparable injury and loss of $50 million in Christmas business and (3) that no adverse impact upon the public existed are not clearly erroneous and should not be reversed.

The district court found that the "balance of hardship" obviously tipped toward plaintiffs since they were faced with potential loss of $50 million in Christmas business while the evidence of potential injury to the public was negligible. Furthermore, the Court, in effect, found that the plaintiffs raised very "serious, substantial, difficult and doubtful" questions as to the Commission's right to promulgate suggested test methods to detect concealed defects in Christmas lights without notice and opportunity to comment, Unicon Management Corp. supra. Injunctive relief was warranted under these circumstances.

POINT TWO

THE DISTRICT COURT CORRECTLY RULED THAT THE COMMISSION EXCEEDED ITS STATUTORY AUTHORITY WHEN IT PROMULGATED SUGGESTED TEST METHODS

Judicial review of administrative actions, of course, is governed by the Administrative Act, 5 U. S. C. 701-706. It is clear "that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress". Abbott Laboratories v. Gardner, 387 U. S. 136 (1967)

Section 702, 5 U. S. C. 702, relates to plaintiffs' right of review as follows:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

Section 706, 5 U. S. C. 706, relates to the scope of review:

> "To the extent necessary to decision and when presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall-

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be-

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts' are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error." (Emphasis supplied)

The district court stated that "the heart of plaintiffs' claim is that the program goes beyond information gathering and provides tests to determine defects in Christmas lights. They argue that to the extent it provides standards and tests for determining defective lights,

the C.P.S.C. ventures beyond its statutory authority, 15 U. S. C. 2056 and 2058. These sections set out detailed procedures for the development and promulgation of consumer product safety standards by C.P.S.C; they require identification of product risks, publication of the intentions to develop a safety standard and of the standard when adopted, an opportunity for interested persons to be heard, specific findings of fact and prospective application only of any standard adopted." (A7-8).

Defendants refuse to meet this issue- they merely state that the Commission is engaged in the "dissemination of information" relating to the causes and prevention of injury under Section 5 (a) (1), 15 U. S. C. 2054 (a) (1). Such a contention merely begs the question. Can the Commission promulgate what are tantamount to standards with regulatory impact pursuant to a "Volunteer" program aimed at plaintiffs' customers under the guise of disseminating information?

Section 7, 15 U. S. C. 2056, defines a consumer product safety standard to consist of one or more "requirements as to performance, composition, contents, design, construction ...of a consumer product".

An analysis of the booklet reveals that the suggested test procedures are requirements as to performance, design or construction of Christmas lights.

No. 2 requires that the prongs or blades on the connector be given a substantial push against a hard surface to simulate the effect used in plugging in the set or, with caution, plug the set into a non-live current five times (A28).

No. 3 specifies a test to expose bare wire and involves grasping the wire about one inch from socket or connector and rotating in a crank like fashion three turns to the right then three to the left. The test allegedly simulates ordinary handling (in realty it does not) of lights while packing or decorating (A29).

No. 5 requires the removal and insertion of the bulb several times to check for exposed socket contract (A30).

All of the foregoing involve criteria for performance, design or construction and no notice or opportunity to comment on their reasonableness has been provided by the Commission to the regulated industry.

The Commission contends that the district court erred because its interpretation would create insurmountable time problems. What the Commission appears to be saying is that it takes too long to act in the manner in which Congress mandated. Such a contention requires little discussion since the statutory scheme is clearly defined.

Section 7 (b) of CPSA, 15 U. S. C. 2056 (b), contains detailed procedures for the development of consumer product safety standards and provides as follows:

> "A proceeding for the development of a consumer product safety standard under this Act shall be commenced by the publication in the Federal Register of a notice which shall-
>
> (1) identify the product and the nature of the risk of injury associated with the product;
>
> (2) state the Commission's determination that a consumer product safety standard is necessary to eliminate or reduce the risk of injury;
>
> (3) include information with respect to any existing standard known to the Commission which may be relevant to the proceeding; and
>
> (4) include an invitation for any person, including any State or Federal agency (other than the Commission), within 30 days after the date of publication of the notice (A) to submit to the Commission an existing standard as to the propcsed consumer product safety standard of (B) to offer to develop the proposed consumer product safety standard."

Consumer product safety rules which have been proposed under Sections 7, 15 U. S. C. 2056, shall be promulgated pursuant to Section 553 of the Administrative Procedure Act, 5 U. S. C. 553, except that the informal rule-making has been modified to give interested parties an opportunity for oral presentation of views, data or arguments. Section 9 (a) (2) of CPSA, 15 U. S. C. 2058 (a) (2), provides as follows:

> "Consumer product safety rules which have been proposed under section 7 (c), (e) (1) or (f) or section 8 shall be promulgated pursuant to section 553 of Title 5, United States Code, except that the Commission shall give interested persons an opportunity for the oral presentation of data, views or arguments in addition to an opportunity to make written submissions. A transcript shall be kept of any oral presentation."

The legislative history of the Consumer Product Safety Act clearly indicates the Congressional intent to require compliance with the rule making procedures of the Administrative Procedure Act in all aspects of agency regulation of risks of injury.

The following excerpts from the Report of the House Commerce Committee, Report No. 92-1153, June 20, 1972 relating to Sections 9 and 15 are set forth at length:

> "House Committee Report. Consumer product safety rules under this bill are to be promulgated pursuant to section 553 of title 5 of the United States Code. The committee has modified the informal rulemaking procedures of the Administrative Procedure Act by requiring that the Commission give interested persons an opportunity for the oral presentation of views, data, or arguments in addition to providing an opportunity for the submission of written comments. Also, a transcript must be kept of this proceeding to assure that the views of participating parties will be preserved and available to a reviewing court under section 11.

"In traditional agency rulemaking, it is discretionary with the agency whether to provide an oral hearing under section 553 of title 5. Your committee has decided to remove that discretion and make mandatory that interested persons be afforded an opportunity to orally present arguments to the Commission. In so doing, the Committee sought to reach an accommodation between the informal requirements of section 553 and the formal trial type procedures of sections 556 and 557 of title 5. The informal procedures were not thought to provide the desired opportunity for interested parties to participate in the Commission's rulemaking proceeding; the formal, on the other hand, were thought to unduly involve the Commission in adjudicatory procedures inappropriate to the essentially legislative nature of the rulemaking procedure. The Committee has accordingly crafted an administrative procedure to be employed in this bill which it believes will maximize opportunities to participate in the rulemaking proceeding without unduly entangling the Commission in trial type procedures.

The following excerpts from the Debate on the Floor of the House, Congressional Record, September 20, 1972, are set forth at length:

Rep. Moss, Sept. 20, 1972. . . . [P]roduct safety standards may be issued only after a hearing pursuant to the Administrative Procedure Act. In addition to the requirements of agency to afford interested parties an opportunity for oral presentation of arguments and that a transcript of the proceedings be kept for purposes of court review.

Rep. Broyhill, Sept. 20, 1972 . . . [A]ll final product safety standards or proposed bans must be issued after hearings pursuant to section 553 of title 5. The bill further

requires the Commission to afford interested parties with an opportunity for oral presentation of arguments, requires that a transcript be kept, and that it be filed as a part of the record upon court review."

"Rep. Eckhardt, Sept. 20, 1972. Mr. Chairman, section [15] (c) . . . deals with the administrative process which must precede the giving of notice of defect or failure to comply in the case of a product. Section [15] (d) . . . deals with the ultimate action of the Commission which may order a company to bring a product into conformity or to replace the product or to refund money.

Originally we had provided two separate processes for these two administrative procedures. We had a more or less curtailed process with respect to the giving of public notice of the defect and we afforded the full ramifications of section 554 of title V of the United States Code to the ultimate process of calling for bringing the product into conformity. In other words the ultimate action of holding a product out of conformity and requiring it to be brought into conformity and the money paid back was protected by the full range of the Administrative Procedure Act's adjudicatory processes, but we had thought that a public notice of defect did not necessarily need quite that much protection and might have to be ordered rather summarily.

In discussing the matters with some of the industries that would be affected, they made the point, and I think they made it well, that to notify one's consumers that there may be a defect in one's own product may be very injurious, and that part of the total impact of the proceeding has been sustained by the industry before it has been afforded full process for its defense. Therefore, they said that there should be a fuller adjudicatory process, even preliminary to the defect notice.

They also raised this question: they said there should not be two different hearings. And if we set up merely the standards of section 553 with the additional requirement of the oral hearing as

applicable to the defect notice and then we give the full ramifications of the adjudicatory process to the ultimate hearing, this requires two hearings. Why have two under the circumstances?

So, agreeing, we discussed it among the subcomittees and we offer this amendment, which makes the same process available to the notice of defect requirement as that applicable to the process calling for bringing the product into conformity and imposing other penalties or requirements.

* * *

Now, the amendment to the earlier provisions [6(b)] is merely to make it clear that in a proper case, since we are not providing for the quicker means of compelling the manufacturer to give notice of defects, that the agency itself may give that notice at an earlier time than after the 30 days ordinarily required as a waiting period.

This is the effect of this amendment.

Rep. Broyhill. Mr. Chairman, I want the Members of the Committee to know that what you are doing with your amendment is giving a manufacturer whose product is found to be in noncompliance, a greater right to be heard, to have his day in court, as the old saying is, and give him far more protection under this language in the bill. I support the amendment."

Congress has granted the Commission extraordinary powers to regulate the safety of consumer products. The Commission is authorized to promulgate safety standards; propose rules for banning hazardous products;order manufacturers to take remedial action by notice, repair, replacement or refund; take emergency action against imminent hazards; refuse admission

to imported products which fail to meet safety standards; and undertake injunctive relief and seizure, 15 U. S. C. 2056, 2057, 2064, 2061, 2066 and 2071. Civil and criminal penalties are available, 15 U. S. C. 2069, 2070.

Balanced against the Commission's awesome powers are the procedural rights of due process, including notice and opportunity to be heard. The Commission should not be permitted to abrogate those rights under the guise of disseminating information.

The legislative history of Section 5, 15 USC 2054, indicates that the Commission's right to collect and disseminate information was merely intended to facilitate the promulgation of safety standards rather than effectuate a means of avoiding their promulgation.

The Report of Senate Commerce Committee, 92nd Congress, Report No. 92-749, April 13, 1972 states:

> "By collecting and disclosing information on consumer product risks the Commissioner would be able to prevent many injuries, <u>have a data base for facilitating the design of relevant standards and evaluate the efficacy of existing standards.</u>" (Emphasis supplied)

POINT THREE

DEFENDANTS HAVE FAILED TO COMPLY WITH THE NOTICE AND COMMENT PROVISIONS OF THE ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. 553

The order granting injunctive relief must be affirmed if defendants have failed to comply with other statutory requirements relating to issuance of test methods.

In Dandridge v. Williams, 90 S. Ct. 1153, 1156, 397 U. S. 471, 475 (1970), the Supreme Court stated that the prevailing party may, of course, assert in a reviewing Court any ground in support of its judgment, whether or not that ground was relied upon or even considered by the trial court. See also Kansas City Life Ins. Co. v. Wells, 133 F.2d 224 (8th Cir. 1943).

Section 4 of the Administrative Procedure Act, 5 U. S. C. 553 sets forth the requirements for agency rule-making as follows:

> "(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with the law. The notice shall include --

(1) a statement of the time, place and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice of hearing is required by statute, this subsection does not apply --

(A) to interpretative rules general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

"(c). After notice required by this action, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, arguments with or without opportunity for oral presentation. After consideration of the relevant matters presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.

When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

"(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except --

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule." (Emphasis supplied)

Section 551(4), 5 U.S.C. 551 (4) defines a rule as the "whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy."

In Pharmaceutical Manufacturers Association v. Finch, 307 F. Supp. 858 (D. C. Delaware 1970), an association of pharmaceutical manufacturers moved against the Secretary of HEW and the Commissioner of Foods and Drugs for declaratory and injunctive relief with respect to certain regulations promulgated by the Commissioner. The challenged regulations promulgated new standards of evidence necessary to demonstrate the effectiveness of drug products and those standards applied retroactively so as to place in jeopardy the continued marketing of thousands of drug products introduced with FDA approval.

Plaintiffs advanced four grounds for challenging the validity of the regulations, one of which was that they were invalid because they were issued without notice and opportunity for comment in violation of the requirements of Section 4 of the Administrative Procedure Act, 5 U. S. C. 553. The Commissioner characterized the regulations as "interpretative" and exempt from the requirements of notice and opportunity to be heard.

In granting a preliminary injunction, the Court

"Attempting to provide a facile semantic distinction between an 'interpretative and procedural" rule on the one hand and a 'substantive' rule on the other does little to clarify whether the regulations here involved are subject to the notice and comment provisions of Section 4 of the Administrative Procedure Act. Rather that determination must be made in the light of the basic purposes of those statutory requirements. The basic policy of Section 4 at least requires that when a proposed regulation of general applicability has a substantial impact on the regulated industry, or an important class of the members or the products of that industry, notice and opportunity for comment should first be provided."

Again the Court stated at 307 F. S. page 864:

"The September regulations, which prescribe in specific detail, for the first time, the kinds of clinical investigations that will be deemed necessary to establish the effectiveness of existing and future drug products and which require that such evidence be submitted as a condition to avoiding summary removal from the market, are pervasive in their scope and have an immediate and substantial impact on the way PMA's members subject to FDA regulation, conduct their everyday business. The regulations apply to more than 2,000 drug products first marketed between 1938 and 1962 with FDA approval and place all of them in jeopardy, subject to summary removal by order of FDA.

The all pervasive and substantial impace which the September regulations have upon the drug industry and in turn upon prescribing physicians and their patients, make it imperative that the Commissioner comply with the notice and comment provisions of Section 4 before such regulations become effective."

In Clever Idea Company v. Consumer Product Safety Commission, 385 F. Supp. 588 (E. D. N. Y. 1974), manufactuerers sought a preliminary injunction restraining Consumer Product Safety Commission and its members from enforcing regulations

banning the sale and distribution of toys which utilized plastic mouthpieces. The Court granted injunctive relief and ruled that defendants had not complied with the notice and comments provision of the Administrative Procedure Act, 5 U. S. C. 553 since the banning orders had been based on the use of test procedures which had been proposed but not promulgated or adopted. Relying on the Finch case, supra, the Court found that the test procedures were substantive rules of general impact since they prescribed in specific detail for the first time "the kind of tests which will be deemed necessary to establish the trustworthiness of existing and future mouthpieces."

Similarly, the Commission herein has issued test procedures to identify electrical hazards in Christmas decorative lights in specific detail for the first time which will be utilized by consumer deputies and will have substantial regulatory impact upon the plaintiffs. The Commission's contention that its test methods are merely "interpretative" and similar to a suggested procedure for checking the freshness of a Christmas tree is without merit, Finch, supra.

In Texaco v. Federal Power Commission, 412 F. 2d 740 (3rd Cir. 1969), the FPC had issued an order, without opportunity for notice and comment, requiring the payment of interest "compounded monthly" on refunds ordered by FPC. The order established

a mandatory policy affecting all sellers of natural gas subject to regulation under Section 4 (c) of the Natural Gas Act, 15 U. S. C. 717 c (e). In rejecting the FPC's argument, that notice and comment were unnecessary under the exception in Section 4, the Court stated that Section 4 "enables the agency promulgating the rule to educate itself before establishing the rules and procedures which have a substantial impact on those regulated."

The same governing principles were emphasized in an opinion of a three judge district court in National Motor Freight Traffic Ass'n. v. United States, 268 F. Supp. 90 (D.D.C. 1967). That decision involved an action by associations of motor freight carriers to nullify ICC's action in establishing an informal procedure for restorations to shippers of past charges which are currently agreed by carrier and shipper to have been illegal. The Court rules that the notice and comment requirements of Section 4 should be complied with whenever an administrative agency takes new regulatory action of general importance to the regulated industry and to the public.

See NLRB v. Wyman-Gordon Co., 394, U. S. 759, 764, 89 S. Ct. 1426 (1969); Seaboard World Airlines, Inc. v. Gronouska, 230 F. Supp. 44,46 (D. D. C. 1964).

In Lewis-Mota v. Secretary of Labor, 469 F. 2d. 478 (2nd Cir. 1972), an action was brought to obtain a judgment that a directive of the Secretary of Labor abrogating pre-certification of certain occupations for visa issuance was not promulgated in conformity with Section 4 of the Administrative Procedure Act. The Court held that notice and opportunity for comment should have been provided since the directive changed existing rights and obligations by requiring pre-certified aliens to submit proof of specific job offers, as well as a statement of qualifications and thereby make it more difficult for employers to fill vacancies in occupations no longer precertified. The Court of Appeals cited Pharmaceutical Manufacturers Ass'n. National Motor Freight Traffic Ass'n. and Texaco as authority.

Defendants have taken regulatory action which has a substantial impact upon plaintiffs without complying with notice and comment provisions of Section 4 of the Administrative Procedure Act.

As Judge Platt stated in the Clever Idea case, 485 F. Supp. 695:

> "On balance, the Court feels that Congress with its usual wisdom prescribed the right road for the Commission to follow before applying the proposed bite test, namely, to comply with the notice and comment provisions of 5 U. S. C. 553. In light of Dr. Krogman's testimony, further

> modifications of the bite machne might well be in order prior to the adoption of the proposed Regulations and members of the industry would then be in a position at least to know that if their products failed to measure up to an adopted (as distinguished from a proposed) standard, they might be exposed to all of the risks and penalties prescribed in the statute. Elemental principles of fairness would seem to dictate that this be done in this case."

Defendants contend that the test methods set forth in the booklet (A.26) are analagous to the Commission's public statements advising consumers to be alert for an odor emanating from an electrical product or heat emanating from the face plate of an appliance. However, the odor and heat cautions are observible defects and do not require performance of test methods. The district court order did not enjoin the Commission from issuing warnings about observible defects, such as cracket sockets or exposed parts, in decorative lights. Only suggested test methods to detect "concealed defects" were enjoined (A.6).

Defendants' reliance on F.T.C. v. Cinderella Career and Finishing Schools is easily distinguishable. A press release relative to commencement of adjudicative proceedings by an agency is not the promulgation to test methods to detect concealed defects.

POINT FOUR

DEFENDANTS HAVE FAILED TO PUBLISH THEIR TEST METHODS IN ACCORDANCE WITH THE FREEDOM OF INFORMATION ACT, 5 U. S. C. 552

Section 552 (a) of the Administrative Procedural Act, 5 U. S. C. 552 (a) provides, in pertinent part, as follows:

> 1. Each agency shall separately state and currently publish in the Federal Register for the guidance of the public-
>
> (A) * * * *
> (B) * * * *
> (C) * * * *
> (D) Substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and
>
> (E) Each amendment, revision or repeal of the foregoing.
>
> Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published.
>
> 2. Each agency, in accordance with published rules, shall make available for public inspection and copying-
>
> (A) Final opinions * * * *
> (B) Those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) Administrative staff manuals and instructions to staff that affect a member of the public * * * *

Each agency shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted or promulgated after July 4, 1967 and required by this paragraph to be made available or published. A final order, opinion, statement of policy, interpretation or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than as agency only if-

(i) it has been indexed and either made available of published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof. (Emphasis supplied)

In Piercy v. Tarr, 343 F. Supp. 1120 (D. C., N. D. Calif. 1972) the plaintiff attacked the promulgation by Selective Service of informal detectives which validated the issuance of certain work orders to registrants classified as conscientious objectors. The Court held that the directives which purported to alter significantly the rules and regulations pertaining to the order of call of conscientious objectors are required to be published in conformity with the foregoing statutes.

The Court states at 343 F. Supp. page 1128:

It matters little whether the directive is a 'rule,' an 'order ' or a set of 'instructions' or only a sui generis 'directive.' Whenever it is in law, it purports to be an authoritative declaration of policy issued for the guidance of the selective service system's line officers."

Accordingly, the directives were held to be void.

See Gardiner v. Tarr, 341 F. Supp. 442 (D. D. C 1972), also involving promulgation of selective service regulations held to be void under APA and Selective Service Act.

The test procedures set forth in the booklet entitled "What Can you Do Now and How Should You Do It" are subject to the provisions requiring publication in the Federal Register, 5 U. S. C. 552 (a) (i). These test procedures have a substantial impact upon the Christmas decorative light industry since (1) they outline the alleged potential hazards in those products; (2) they are guidelines for inspection by volunteers and (3) their application will result in the removal of certain Christmas decorative lights from sale. The failure of the Commission to properly publish adversely affects the members of the Christmas decorative lights industry. See also Gonzalez v. Freeman, 334 F. 2d 570 (D. C. Cir. 1964), Low v. Thomas, 163 F. Supp. 945 (E. D. Pa. 1958); Pinkus v. Reilly, 157 F. Supp. 548 (D.C. N.J. 1957)

POINT FIVE

DEFENDANTS HAVE FAILED TO COMPLY WITH §6 OF CPSA IN DISSEMINATING INFORMATION RELATING TO PLAINTIFFS" PRODUCTS

Section 6(b)(1) of CPSA 15 U.S.C. 2055, provides as follows:

> "Except as provided by paragraph (2) of this subsection, not less than 30 days prior to its public disclosure of any information obtained under this Act, or to be disclosed to the public in connection therewith (unless the Commission finds out that the public health and safety requires a lesser period of notice), the Commission shall, to the extent practical, notify and provide a summary of the information to, each manufacturer or private labeler of any consumer product to which such information pertains, if the manner in which such consumer product is to be designated or described in such information will permit the public to ascertain readily the identity of such manufacturer or private labeler, and shall provide such manufacturer or private labeler with a reasonable opportunity to submit comments to the Commission in regard to such information. The Commission shall take reasonable steps to assure, prior to its public disclosure thereof, that information from which the identity of such manufacturer or private labeler may be readily ascertained is accurate, and that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes of this Act. If the Commission finds that, in the administration of this Act, it has made public disclosure of inaccurate or misleading information which reflects adversely upon the safety of any consumer product, or the practices of any manufacturer, private labeler, distributor, or retailer of consumer products, it shall, in a manner similar to that in which such disclosure was made, publish a retraction of such inaccurate or misleading information."

In GTE Sylvania, Incorporated v. Consumer Product Safety Commission, Civil Action No. 75-104, (D. C. Delaware, 1975), 1 CPS ¶ 75,090, thirteen separate manufacturers of television sets sought a preliminary injunction restraining defendants from disseminating certain information. During 1974, defendants had obtained television-related accident data from television manufacturers. The data was consolidated and a computer printout was prepared which listed the accidents separately. On May 28, 1975, defendants decided to release the accident-related material in their possession to the public. Defendants contended that release of the information would facilitate the public in comparing the safety of various television models.

In granting a preliminary injunction, the court held that disclosure of the information would not be fair in the circumstances and was not reasonably related to the purposes of CPSA. In defining the word "information" as used in §6(b)(1), Judge Latchum stated that the word "embodies a concept of more than just empirical data. It is especially important to be aware of the impression that will be created by release of the data when the primary purpose for disclosure is to enable comparative safety shopping."

In holding that the threat of irreparable injury existed, the court stated that "the plaintiffs' reputations

would suffer substantially from the Commission's release of misleading safety information. The risk is not merely speculative, and furthermore the irreparable nature of injury to commercial reputations has been widely recognized."

Similarly, the Commission has disseminated to retailers and to the public "information" consisting of test methods which will permit the retailers and the public to ascertain the identity of plaintiffs' product by application of said test methods. Such disclosure is unfair under these circumstances since it will have the effect of branding all of the plaintiffs as manufacturers of unsafe products. As Judge Latchum stated, the impression which will be created by release of the data is the primary purpose underlying Section 6. Plaintiffs' reputation will suffer substantially from the Commission's release of misleading safety information, which can be related to their products. Having failed to comply with Section 6, injunctive relief is appropriate.

CONCLUSION

For the foregoing reasons, the order of the district court granting injunctive relief should be affirmed.

Respectfully submitted,

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